

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC. APPLICATION No. 2385 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE K.J.VAIDYA

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1. Whether Reporters of Local Papers may be allowed to see the judgements ? YES
2. To be referred to the Reporter or not ? YES

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3. Whether Their Lordships wish to see the fair copy of the judgement? NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder ? NO
5. Whether it is to be circulated to the Civil Judge ? YES

ARVINDBHAI RAVJIBHAI PATEL

Versus

DHIRUBHAI SAMBHUBHAI KAKADIA

Appearance:

MR CJ VIN for Petitioner

MR UMESH TRIVEDI,APP for Respondent No. 1

SERVED for Respondent No. 2, 3

CORAM : MR.JUSTICE K.J.VAIDYA

Date of decision: 06/01/97

ORAL JUDGEMENT

Petitioner by this Misc. Criminal Application under section 482 of the Code of Criminal Procedure,

1973, has moved this court, inter alia, praying for quashing and setting aside the proceedings by way of Criminal Case No. 66/91 pending before the learned learned Chief Judicial Magistrate, Surat, initiated pursuant to the complaint filed by the respondent No. 3 for the alleged offences punishable under sections 406, 420, 504 and 506 of IPC.

2. Facts and circumstances in brief leading to filing of this petition. The respondent no.3 Dhirubhai Shambhubhai Kakadia filed a complaint against the petitioner-Arvindbhai R.Patel for the alleged offences punishable under sections 406, 420, 504, 506(2) of IPC before the learned Chief Judicial Magistrate, Surat. It is alleged in the complaint that the accused had developed friendly relations with him and had borrowed Rs. 90,000/- from him in the year 1988, which he badly needed for purchasing the building material in carrying forward his construction business. While taking the said loan, the accused had also shown his willingness to transfer his house bearing Block No.26, situated in Hariom Society, Surat, in the name of the complainant. Trusting the words of the accused, complainant paid Rs. 90,000/= in cash to him on the very day in presence of Vipulbhai and Valjibhai. Not only that, but the petitioner also transferred his aforesaid house in name of the complainant by executing a writing on a General Stamp Paper of Rs. 10/-. Thereafter, according to the complainant, not only the accused failed to repay the borrowed amount of Rs. 90,000/- for which he had repeatedly visited his house, but the house in question which was transferred to him, was also sold to somebody else. It is further the case of the complainant that on 31-3-1991 at 11-00 AM the accused met him on Varachha Road and when he demanded Rs. 90,000/= from him, he immediately got enraged and stated that he has not executed any document transferring his house and he has not taken any loan from him. It is further alleged in the complaint that the accused while giving abuses further threatened that if he demanded the money, his hands and feet will not be safe. It is under these circumstances that the respondent No. 3 was constrained to file a complaint against the petitioner for the aforesaid alleged offences in the court of the learned Chief Judicial Magistrate, Surat, wherein the learned Magistrate by his order dated 4-4-1991 directed the Police Inspector of the concerned area under section 156 (3) of the Code to inquire and report back, giving rise to the present application for quashing and setting aside the impugned order.

3. Heard Mr. C.J Vin, learned advocate appearing for the petitioner and learned APP Mr. Umesh Trivedi appearing for the respondent No. 1 - State. Respondent No. 3 -original complainant though duly served is absent.

4. Mr. C. J Vin, the learned advocate appearing for the petitioner while challenging the impugned order, vehemently submitted that not repaying the borrowed loan was at the most civil wrong, not only that but there is indeed nothing in the complaint to remotely even indicate that the petitioner-accused had any intention to cheat at the time when he borrowed loan of Rs. 90,000/= from the complainant.

4(1) Now, it is simply not possible to accept the above contention of Mr. Vin. Whether the accused had an intention to cheat right from the beginning or not is ordinarily and always a matter of evidence either to be adduced before the Court at the time of trial, or reasonably inferred from the attending facts and circumstances of the case as narrated in the complaint. ! Apart this, assuming for the sake of argument even that there was indeed no intention of the accused at the time when Rs. 90,000/= came to be borrowed and paid in cash. But then, in a given case, it cannot be ruled out that though at the initial stage there may not be any such intention to cheat, yet with the passing of time, the dishonest intention not to pay the borrowed amount can certainly develop ! For criminal offence and consequential punishment what is necessary is the element of 'mens-rea' and this in a given case can be there right from the beginning or that may as well develop subsequently and gain root making the person accused dishonest liable for the punishment. Not only this, but let us test this aspect of subsequent development of dishonesty from yet another angle. Accordingly, if indeed, the accused had no intention to cheat, and accordingly he was rather ready and willing to pay up the amount due, then he should, in the first instance, pay-up the same and in the second instance, failing to pay-up prove his bonafide by showing that because of some unforeseen unfortunate intervening circumstances, unexpected loss or financial crisis he came to be prevented by the circumstances beyond control and was unable to pay -in other words there was no dishonest intention to honour the obligation. If this is not done by the accused, the Court would be quite justified in drawing the legitimate inference from the proved facts that the accused had dishonest intention of not paying the amount, may be from beginning or may be subsequently ! Atleast before filing

the complaint under section 406, 420 of the IPC before the court. The reason is intention is never writ large on face of the accused. Infact, taking into consideration unpredictable changing nature of human beings, it can be reasonably said with certainty that a person who was honest at a stage and point of time, may subsequently become dishonest with the passage of time. This is the hard fact and reality of life ! It is a part and parcel of thinking process which is not readable to ordinary eyes. It can be read with mental eye of just and proper inference. Further still, whether a person had an intention to cheat right from the beginning or not, can certainly be judged from his subsequent and ultimate conduct of not paying of. In this view of the matter, when a person takes loan, borrows some amount and despite his financial capacity to pay, does not pay, then in that case once the evidence of complainant prima facie satisfies the Court about the alleged transaction and proves case to the said extent then ordinary and reasonable inference of cheating needs to be drawn, unless of course as stated above, the accused has some material justifying his stand not to honour his obligation, negativating dishonest intention to cheat ! But here also, this is once again a matter of defence which is required to be pleaded, tested-out and ultimately get convinced to the Court !! Thus, looking to the nature of allegations in complaint, and subsequent conduct of accused in not paying back loan amount it is indeed not possible for this court to say at this stage that it does not contain the germs constituting prima facie offence of cheating against the petitioner-accused for taking the cognizance of the alleged offence by the learned Magistrate, under sections 406, 420, 504 and 506 (2) of IPC. If after taking loan, for the considerable period the same is not paid till the date the complaint is filed, then from that point of time it can be prima-facie said that he had the dishonest intention not to pay right from the beginning. If the law is not interpreted in this manner, dishonest persons would schemingly skip the law and defeat the justice. That is not the way to handle criminal justice system ! In this view of the matter, there is no question of quashing and setting aside the complaint filed by the respondent and accordingly, this petition deserves to be dismissed.

5. Further still, while dismissing this petition, what is quite disturbing is the most indiscreet manner in which the learned Magistrate has mechanically directed the PI of the concerned police station to investigate the case under section 156 (3) of the Code and submit his report !! In fact, if we peruse the allegations in the

complaint, they are too simple requiring any assistance worth the name of the police to investigate into the matter !! And yet the fact remains that the learned Magistrate has quite curiously directed police to investigate under Section 156 (3) of the Code and report back. As a matter of fact, instead of directing the PI to investigate under section 156(3) of the Code, it was the duty of the learned Magistrate of his own to straightway take the cognizance of alleged offences and decide the case after recording the oral and documentary evidence as the case may be as lead by the complainant and hearing the defence version. In fact, having regard to the facts and circumstances of the case, this is not at all the case where by any stretch of imagination, the learned Magistrate needed any police assistance to inquire into the case . One can quite understand some such complex, complicated cases wherein a Judge/Magistrate sitting in the Court-room cannot go out of it to various places and persons to collect the data, and accordingly seize some, muddamal articles, documents in possession of accused or his associates , etc. which requires investigation and because of which in absence of police investigating under section 156 (3) of the Code ultimately the cause of justice would suffer. Accordingly, it is indeed here in such cases only where the Investigating Agency is required to be called in assistance and will figure into the picture to supplement its role as one of the important components/functionary of the administration of justice to assist the Court. In this view of the matter, all the learned Magistrates of the State are hereby specifically directed to be henceforth be quite discreet enough in not mechanically directing the police to investigate the case under Section 156 (3) of the Code, When the allegations in the complaint are simple enough and further where the Court undoubtedly can straightway proceed to conduct the trial, in such cases the Court before which the complaint is filed, shall never mechanically abandon its sacrosanct duty of recording the evidence and doing justice by passing a buck to the police for doing the needful. This is clear abdication and dereliction of duty. In fact, this court in number of such cases have noticed quite unfortunate growing tendency on the part of some of the learned Magistrates to direct the police to investigate under section 156 (3) of the Code and report reflecting total arm-chair relaxed attitude and non-application of mind !! This is required to be curbed in the overall interests of justice. When the complainant approaches the Court making a grievance disclosing cognizable offence, it is the duty of every Court in the first instance to carefully examine the complaint and find out whether it

prima facie discloses the offence worthy of issuing the process, in the second instance, whether the allegations in the complaint are such which involve quite complex and complicated investigation of the case which without the active and expertize assistance of the police cannot be undertaken, then in that case, in the third instance, it would be quite desirable to serve notice alongwith a copy of the complaint to the concerned P.I or P.S.I. to remain personally present before the Court, appraise him of the situation and take a stock of the situation as to within what time bound period, he would be in a position to to complete the investigation and submit his report under section 156 (3) of the Code, and in the fourth instance, when it is of the view that having regard to the nature of allegations in the complaint calling of the police report under Section 156 (3) of the Code is unavoidable, then in that case while ordering for the same , it shall make it time bound that is to say report to be submitted within some stipulated period, as warranted by the facts and circumstances of the particular case, directing the concern police officer to submit the periodical progress report of the investigation every two weeks on affidavit till the final report is submitted on the given date. This is absolutely necessary to keep the investigating agency alert, efficient and under the control of the Court to avoid, in some cases, lethargy and avoidable delay in investigation of the case. In substance, while passing any order pursuant to the complainat, it must reflect the total application of mind by the learned Magistrate.

4.1 Something more ! Sometime, in some cases it is alleged that though the complaint is simple enough for the court to straightway record evidence and conduct trial, yet, some scheming, manipulating complainants are interested in securing order from the learned Magistrate whereby the concerned police station is directed to investigate under section 156 (3) of the Code and report etc. with a view to strike quite unjust, illegal and unfair bargain with accused with the pre-arranged plan and help of the police pressure ! This sort of allegation in a given case may be true, may not be necessarily true in all cases. But then these days experience does tell us that 'nothing is impossible' and accordingly, such apprehensions cannot be lightly ruled-out summarily !! Any way, the real point to be borne in mind is that the learned Magistrate should be clear and discreet enough before passing any order under section 156(3) of the Code, so that some scheming unscrupulous complainant does not abuse the process of law making the learned Magistrate hand-tool of him.

5. In the result, this petition fails and is dismissed. The learned Magistrate accordingly shall himself proceed with the trial within two months from the date of receipt of this judgment and dispose of the case at the earliest best by issuing notice to the complainant and the accused.

6. The Registrar is directed to forward a copy of this judgment to (i) all the learned Magistrates in the State and (2) Director, Judicial Academy, Gujarat State, Ahmedabad for necessary instructions.

Joshi/pt*